

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DIRECT MARKETING CONCEPTS, INC., et al.

Defendants.

Civ. No. 04-11136-GAO

(Proposed)

**MODIFIED PRELIMINARY INJUNCTION ORDER AS TO DEFENDANTS DIRECT
MARKETING CONCEPTS, INC., ITV DIRECT, INC., AND DONALD W. BARRETT**

This action was filed on June 1, 2004. Plaintiff Federal Trade Commission (“FTC” or “Commission”) alleges, *inter alia*, that Defendants’ promotion of two dietary supplements, Coral Calcium Daily and Supreme Greens with MSM, violates Sections 5(a) and 12 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 45(a) and 52. Pursuant to Section 13(b) of the Act, 15 U.S.C. § 53(b), the Commission sought preliminary relief and on June 23, 2004, the Court issued a Preliminary Injunction Order as to Defendants Direct Marketing Concepts, Inc., ITV Direct, Inc., and Donald W. Barrett (“Preliminary Injunction”). The primary purposes of the Preliminary Injunction were to prevent Direct Marketing Concepts, Inc., ITV Direct, Inc., and Donald Barrett (“Defendants”) from harming consumers by disseminating false and unsubstantiated advertising claims and by enrolling consumers in continuity plans without their informed consent.

On May 26, 2005, the Commission filed a Motion for a Modification of the June 23, 2004 Preliminary Injunction and requested that the Court modify the Preliminary Injunction by

appointing a receiver over defendants Direct Marketing Concepts (“DMC”) and ITV Direct, Inc. (“ITV”). The FTC contended that the subsequent actions of Defendants warranted the appointment of a receiver.

Proposed Findings of Fact

On the basis of the affidavits presented, the Court finds the following facts:

1. This Modified Preliminary Injunction as to Defendants DMC, ITV and Donald Barrett (“Barrett”) (collectively “Defendants”) incorporates all of the findings of fact, conclusions of law and injunctive provisions of the Preliminary Injunction and does not supercede the Preliminary Injunction.
2. In opposing the Commission’s initial request for a temporary restraining order and preliminary injunction, on June 23, 2004, Barrett submitted an affidavit that stated:

In light of the FTC’s continuing concerns over the Supreme Greens with MSM infomercial and other infomercials involving ingestible products, ITV determined several weeks ago that it would no longer produce or air any infomercials involving ingestible products. As of the date of this affidavit, I am unaware of any infomercial for any ingestible product that is being aired by ITV or DMC, and ITV, DMC and I have no plans to run any such infomercial in the future.

3. One day before Barrett’s affidavit was submitted to the Court, an ITV employee wrote to ITV’s Director of Operations (Barrett’s sister), that “[Y]ou might want to be careful about this statement in light of the fact that ITV’s Vice President of Business Development is in current negotiations for an ingestible product. Clearly the policy change regarding products of interest to ITV has not been communicated throughout the organization.”

4. Since the entry of the Preliminary Injunction, ITV, DMC and Barrett have produced or disseminated at least five new infomercials for various products: a) Sea Vegg; b) Renuva; c) Dr. Day’s Home Juice Bar; d) Aquasana; and e) RegenaLife. Contrary to Barrett’s

representation to the Court that ITV “would no longer produce or air any infomercials involving ingestible products,” four of those infomercials promote the sale of ingestible products, the exception being Aquasana, which is a water filter. All five infomercials make health claims.

Sea Vegg

5. One infomercial Defendants disseminated after the issuance of the Preliminary Injunction is for a product called Sea Vegg, an ingestible product made of dried seaweed. The infomercial features Donald Barrett and Scott Kennedy discussing the health benefits of Sea Vegg in a setting – quite similar to that of the Supreme Greens infomercial – that mimics a conventional talk show and includes the following passages:

DONALD BARRETT: . . . If you’re out there and you suffer from cancer, arthritis, diabetes, fibromyalgia, really any chronic degenerative disease, or if you don’t want to get a chronic degenerative disease, this is a show you’re not going to want to miss. On our show today we have Scott Kennedy, who’s a firm believer that most chronic degenerative diseases can be prevented and reversed from nutrients that come from the ocean. We have a very controversial show, so stay with us.

SCOTT KENNEDY: [The drug companies] come right out and say they want to turn cancer into a chronic and manageable disease. No, thank you. I don’t want to turn cancer into a manageable disease. I want it out of my life, out of family’s life and I want it to go away like it used to be away and --

DONALD BARRETT: But have you seen that happen? You’ve been studying the problems for years.

SCOTT KENNEDY: I have seen it –

DONALD BARRETT: Have you seen that happen?

SCOTT KENNEDY: I’ve seen the Japanese. If anybody just goes online or in the library, they can study it. For some reason, the information is curiously missing from this country.

DONALD BARRETT: You’re saying the information is being suppressed in this country?

SCOTT KENNEDY: It's not being given to us by health professionals who are drug-based health professionals. . . .

SCOTT KENNEDY: . . . I haven't had a cold, flu or fever in -- since 1992. I stopped carrying health insurance. I have an accident policy. Why? Because my pH is balanced with seaweed. . . .

DONALD BARRETT: No health insurance?

SCOTT KENNEDY: In my lifetime -- in 20 years, everybody's gotten sicker and I've gotten healthier and I'm a proponent for eating seaweed every day in America and we're the only company that does this responsibly, has the science behind it and I've been at it 21 years.

SCOTT KENNEDY: . . . [i]n the meantime, all I want to do is get seaweed to your viewers, help people get healthier, like I did my mother and my sisters and my friends and my family and help their pets and help their children.

DONALD BARRETT: If somebody's sick, if they have some chronic degenerative disease, cancer, arthritis, diabetes, fibromyalgia, all the diseases that are running rampant right now --

SCOTT KENNEDY: Um-hum.

DONALD BARRETT: -- should they take more than three capsules a day?

SCOTT KENNEDY: Let me put it in perspective for you. The Japanese people, as a culture, from studies -- and some of the studies are over here and over here -- eat an average of seven grams a day. That's over a bottle of this. So, don't worry about OD'ing. And if they have diseases or they have something they're concerned with, they should consult their physician.

DONALD BARRETT: Unfortunately, we're running out of time. We will have you back. But if there's one thing that somebody can do out there to live a healthier, happier, disease-free life, what would you recommend?

SCOTT KENNEDY: If there's one thing anyone can do every day that can have the most beneficial impact on their health and the possibility of regeneration it's eating whole marine algae, especially blends of it like we have in our Sea Vegg every single day. ...

DONALD BARRETT: You sound so confident.

SCOTT KENNEDY: Well, I've been on it for 20 years and I've seen so much. I can't even explain what I've seen. I've got testimonials and letters and tapes. You wouldn't believe what I've heard. In fact, I thought it was miraculous when it helped my mother's MS. But what I've seen since then, you wouldn't believe that one type of supplement could do all these things. . . .

DONALD BARRETT: Weight loss? Fifty percent of our population is now considered obese --

SCOTT KENNEDY: Um-hum.

DONALD BARRETT: -- by medical standards.

SCOTT KENNEDY: Yes.

DONALD BARRETT: Could this help people lose weight?

SCOTT KENNEDY: The answer is this, when people take Sea Vegg every day, it will normalize their weight and begin to normalize their thyroid. People that are too underweight will gain weight and women that are overweight will begin to lose some pounds and inches right away without even trying.

DONALD BARRETT: So, by taking the Sea Vegg, it will bring you to your -- the weight that you should be at?

SCOTT KENNEDY: Yes, despite your eating habits. Then your cravings will begin to change and your weight will change and sugar -- your cravings for sugar and certain things that aren't good for you --

6. The Sea Vegg infomercial claims that Sea Vegg can prevent or treat serious degenerative diseases, including cancer, arthritis, diabetes and fibromyalgia, and promote weight loss as desired.

7. The Commission has provided the declaration of an expert, Christine Skibola, Ph.D., that expresses the opinion that the above claims are either false or not supported by reliable scientific evidence. According to Dr. Skibola, seaweed is a nutritious food that contains

fiber, minerals, and other beneficial nutrients and there are some studies of seaweeds finding limited positive health benefits; however, the existing scientific evidence does not support claims that seaweed can treat or prevent any serious degenerative diseases or promote weight loss.

Renuva

8. The second new infomercial directly addressed by the FTC is for a product called Renuva. The “Renuva system” consists of two products – a sublingual spray and a powder that is mixed into a beverage and ingested. The infomercial does not feature Donald Barrett but it was aired by DMC, ITV and Barrett; in addition, Defendants are providing credit card processing services for Renuva orders and shipping product out to customers. The infomercial features hosts George Hamilton and Cathy Rigby, expert endorsers, and consumer testimonialists speaking about their experiences using Renuva and includes the following passages:

MALE ANNOUNCER: [N]ow, you can experience more energy and the phenomenal wonders of increasing your levels of HGH.

Introducing the Renuva System, a revolutionary two-part system that could turn back the clock five, 10, even 15 years or more on the way you look and feel, guaranteed. And it’s so easy.

* * *

ON SCREEN: Hgh Master Hormone

MALE ANNOUNCER: Because it affects virtually every cell in your body, it has been called the master hormone.

ON SCREEN: Hgh is Vital

- Energy
- Cell Repair
- Brain function
- Muscle growth
- Bone strength
- Healing
- Metabolism

MALE ANNOUNCER: Unfortunately, in our twenties, our level of HGH begins to plummet so that by age 60, we've lost 80 percent or more. And with this loss, the things we hate about aging start to happen, loss of energy, sagging skin, weight gain, loss of sex drive, motivation, memory.

* * *

ON SCREEN: Research on Hgh

Most studies mentioned were conducted with medically prescribed injectable HGH

- Increased Energy and Stamina
- Decreased Weight and Body Fat
- Restored Muscle Mass
- Reduction of Aches and Pains
- Improved Quality of Sleep
- Thicker Skin, Fewer Wrinkles
- Increased Calmness, Less Stress
- Improved Memory
- Increased Sexual Drive
- Faster Recovery from Exercise
- Improved Cholesterol Levels
- Enhanced Metabolism
- Better Ability to Concentrate
- Improved Vision
- Improved Immune System

* * *

GEORGE HAMILTON: [W]hen you take the nutrition base of the Renuva Generator and add that to the activating process of Renuva Infuser, you get what could be the simplest, most effective, non-prescription way to experience the wonders of increased HGH levels ever developed.

ON SCREEN: Dr. Alfred Garbutt, D.C.

Chiropractor/Clinical Nutritionist

Special TV Offer

Renuva

1-800-555-5555

DR. ALFRED GARBUTT, D.C.: This system is real. You know, like you said, there's science behind it that really backs up how it works.

DR. DOUG FRIESEN: People can literally look forward to a 10 to 20-year change of how they look and how they feel.

* * *

CATHY RIGBY: I don't think I've ever felt better in my life. I really feel the difference in my body. I really feel the difference. It's great to feel good. It's great to feel great at 50.

GEORGE HAMILTON: . . .It just makes you feel terrific. I feel like a racing machine, a lean, mean racing machine.

KAREN SCOTT: A huge difference in my life.

FRANK BAKER: One of the most important things I've ever done.

CYNTHIA DOWNEY: Energy.

PATTI NICKLAUS: Sleeping better.

DANIEL TREVOR: Thinking is so much more clear.

LINDA MARTIN: My memory is a lot better.

AL BEARD: Body's more fit.

KATHY BORNSTEIN: My hair is thicker.

PETER MYERS: Look younger.

TERRY LAWLER: Lost the pot belly.

BRUK VANDEWEGHE: Immediately, the first thing that I noticed is that I had a lot more energy. I also slept a lot better, which made me a lot more motivated to go work out. . . . My skin has gotten a lot clearer. I've been a lot more mentally focused. I found that I wasn't getting as sick as often as other people around me. Usually, I get colds really easily, and since I've been on the Renuva System, I don't get sick as much.

9. The Renuva infomercial claims that Renuva can stimulate the body's production of human growth hormone ("HGH") and provide benefits that result from those increased HGH

levels, including increased energy, and improved memory, skin and hair quality, and overall health.

10. The Commission has provided the declaration of an expert, Mary Lee Vance, M.D., that expresses the opinion that the above claims are either false or not supported by reliable scientific evidence.

Deceptive Formats

11. The Commission has also challenged the format Defendants use in the Sea Vegg infomercial and several other infomercials Defendants are currently airing or have recently aired. Despite the Court's clear concern about their use of a format that "mimics a conventional talk show," Preliminary Injunction at 2, Defendants' newly-produced infomercials for Sea Vegg, Aquasana, and RegenaLife all use that same format, with Barrett "interviewing" his "guest," much as the host of a conventional talk show would do. Defendants' inclusion of a few additional disclaimers in these latest infomercials does not alter the misleading nature of their programming.

12. Barrett further strengthens this misleading impression by telling viewers that they are about to see a "controversial show" about a health topic of tremendous importance and by introducing as his "guest expert" on that topic a person who is actually the marketer of the product being promoted. For example, the Aquasana infomercial opens with the following statement:

DONALD BARRETT: Hello, my name is Donald Barrett, and welcome back to a very controversial edition of ITV. Today we're going to be talking about the poisoning of our water supply. On our show today, you'll learn why our drinking and bathing water is causing millions of Americans to become sick and riddled with disease... We have a very controversial show. Stay with us.

ON SCREEN: Today's Guest: Charles Strand, Water Quality Expert

Is Our Drinking Water Poisoning Our Society?

DONALD BARRETT: Charles, thanks for being my guest.

CHARLES STRAND: Thanks for having me.

In fact, Charles Strand is the President of Sun Water Systems, Inc., the company that markets the Aquasana filter system.

13. Defendants used the same approach in the Sea Vegg infomercial and the Regenalife infomercial:

Sea Vegg

DONALD BARRETT: On our show today we have Scott Kennedy, who's a firm believer that most chronic degenerative diseases can be prevented and reversed from nutrients that come from the ocean. We have a very controversial show, so stay with us. Scott Kennedy, welcome to the show.

SCOTT KENNEDY: Nice to be here, Donald. Thank you very much for having me.

RegenaLife

DONALD BARRETT: Let's face it, most of us don't eat right, yet we know we need to. The vast majority of people out there are going to die of some chronic degenerative disease, such as cancer, diabetes, arthritis, even heart disease. These diseases can be directly related to what we eat and what we're exposed to in our environment. . . . The fact of the matter is, folks, most of us are not going to change how or what we eat.

My next guest says there's something out there that's easy, simple and effective that we can do and he can prove it.

* * *

DONALD BARRETT: If you're watching right now and you'd like some more information on Dr. Alex Duarte or the Regenalife product that he's been talking about, pick up the phone and call the number on the screen. As always on ITV, we've worked out a special arrangement with our guest, so when you do call, mention ITV and you will receive a substantial savings off the regular price of the product.

And for a limited time we're making available Dr. Duarte's special health reports. There's actually five of them in there and you'll get them when you order Regenalife. So, pick up the phone and give us a call.

Now, Dr. Duarte, is there any research out there that Regenalife can actually help people with chronic degenerative diseases?

These tactics are, as the Court previously found with respect to the Supreme Greens infomercial, likely to mislead consumers about the fundamental nature of Defendants' programming.

FTC Interactions with ITV/DMC Sales Representatives

14. The Preliminary Injunction enjoined DMC, ITV and Barrett from selling products through continuity programs without "first obtaining the express, informed consent of consumers" to participate in the program, and set forth in clear and unambiguous terms all of the information that Defendants' sales representatives needed to give consumers before signing them up for continuity programs, including:

- a. the fact that periodic shipments will occur without further action by the consumer;
- b. a description of each good or type of good to be included in each shipment;
- c. the approximate interval between each shipment;
- d. a description of the billing procedure to be employed, including the total cost to be charged to the subscriber's credit or debit card, or otherwise billed to the subscriber, for each shipment;
- e. the minimum number of purchases required under the program, if any;
- f. all material terms and conditions of a guarantee, refund, or return policy if any representation is made about such a policy, or, if the Defendants have

- a policy of not making refunds or accepting returns, a statement that this is the policy of defendants DMC, ITV, and Barrett; and
- g. a description of the terms and conditions under which, and the procedures by which, a subscriber may cancel further shipments.

Preliminary Injunction at 20-21.

15. As discussed herein, DMC, ITV and Barrett have failed on at least three occasions to ensure that their sales representatives comply with these mandates, as evidenced by recent undercover telephone calls made by the Commission.

Sea Vegg Sales Call

16. On March 21, 2005, an FTC Investigator, Ms. Christine Turner made an undercover call to ITV using the phone number shown during the Sea Vegg infomercial. During that call, the FTC Investigator, using an undercover name, agreed to make one purchase of three bottles of Sea Vegg after being told by ITV's sales representative that she could not purchase a single bottle. Without providing any of the information required by the Preliminary Injunction, the sales representative stated at the very end of the conversation that he had enrolled her in a continuity program under which she would continue to receive three bottles of Sea Vegg every three months:

JAMIE: [I]nstead of one bottle for \$80, I'll send you three bottles for \$99.95.

FTC INVESTIGATOR: Okay, that sounds better.

JAMIE: All right, if you don't mind holding just a few seconds, I'll be right back with your confirmation.

(Brief pause -- music playing while on hold.)

JAMIE: Okay, sorry for the delay. The total with the shipping and handling is \$111.90 and --

FTC INVESTIGATOR: Okay.

JAMIE: -- just allow two to three weeks to be safe. That's the three-month supply of the Sea Vegg and then starting in about three months, you'll receive your monthly resupply of the Sea Vegg, the three bottles for just \$99.85 every three months. You can cancel or change that at any time by calling customer service, 1-800-215-0063. That number will be right inside your package as well. That's going to [FTC INVESTIGATOR].

Dr. Day Home Juice Bar Sales Call and Renuva Sales Call

19. ITV also failed to abide by the terms of the Preliminary Injunction when on two separate occasions, February 24, 2005 and April 25, 2005, the same FTC Investigator called the toll-free number shown in, respectively, the infomercials for Dr. Day's Home Juice Bar and for Renuva. The sales representatives who signed the FTC investigator up for both continuity programs did ask her whether she wanted the "re-supply program," but did not expressly tell her that her credit card would be charged automatically each month, as opposed to receiving an invoice for each shipment after it arrived. The Preliminary Injunction requires ITV and DMC to provide such customers with "a description of the billing procedure to be employed."

20. The FTC Investigator also placed three additional calls to the Sea Vegg order line. The Commission alleges that an ITV sales representative violated the terms of the Preliminary Injunction in one of those calls.

Distributor Network

21. Defendants are allowing their own distributors to market Supreme Greens, Coral Calcium, Sea Vegg, and other ITV products using health and disease claims. Specifically, the website for DMN Industries, Inc., www.dmnnow.com, features pictures that clearly have been reproduced from ITV infomercials: they show, among others, Donald Barrett with Scott Kennedy (Sea Vegg) and Alex Guerrero (Supreme Greens) in their respective infomercials, and

Kevin Trudeau sitting with Bob Barefoot during the infomercial for Coral Calcium Daily that the Commission challenged in its complaint.

22. The distributor website also makes health claims for some of these products, including the following examples: that “sea plants can transform your health” and “strengthen and detoxify,” and that “many people believe Sea Vegetation acts as [a] miraculous healing agent” (on the pages promoting Sea Vegg); and that more than 150 diseases, including cancer, heart disease, diabetes, fibromyalgia, and arthritis “have been linked to acidity and lack of calcium in the body fluids” (on the page promoting coral calcium).

23. DMN Industries, Inc. is a Massachusetts corporation whose sole officer and director is David M. Noone, an ITV distributor who has ordered thousands of bottles of various products from ITV for resale.

24. Defendants are expanding their distributor network by inviting would-be Sea Vegg distributors to contact an ITV employee in order to join the distributor network.

Financial Issues

21. Defendants are spending substantial resources to repeatedly air the new Sea Vegg and Renuva infomercials. Both infomercials have ranked high on a national list of most frequently aired infomercials for the past few months, demonstrating that Defendants are spending substantial resources to purchase media time that otherwise could be available for consumer redress at the conclusion of this litigation.

22. Defendants have been uncooperative in providing full disclosure to the Commission about some of their spending habits. Parts VIII and IX of the Preliminary Injunction limit DMC, ITV and Barrett to spending for reasonable and necessary expenses. DMC paid American Express \$52,625 in October 2004, and \$56,806 in December 2004. The Commission

has been trying to obtain the underlying credit card statements from Defendants since November 2004, but has been unable to obtain simple credit card statements since that time.

Additional Donald Barrett Statement

23. In response to the Commission's motion for a temporary restraining order, Barrett represented to the Court that it was the FTC that informed him that the original Supreme Greens infomercial was running in April 2004:

Based upon the FTC's concerns, the edited [Supreme Greens] tape was rolled out first in national markets with local markets to follow. . . . ITV Direct sought to substitute the edited tape for the original tape as quickly as feasible.

On April 7, 2004, the FTC called to state that it . . . believed that the original infomercial was running in certain media markets. We then investigated the matter, determined that certain stations were airing the original infomercial, and immediately notified all media outlets to cease running any of the Supreme Greens versions.

24. The implication of Barrett's statement is that those airings of the original infomercial were neither intended by, nor known to, ITV. In fact, ITV had deliberately switched back to the original Supreme Greens infomercial by at least early February 2004, a move that boosted revenues according to ITV's Vice President for Media, who emailed Barrett on February 7, 2004 to say "I was going over the results of the Supreme Green shows that ran this Friday. I was so excited to see the results go up because we switched back to [the] original version Supreme Greens." Two weeks later, Barrett himself wrote to all ITV managers that "We should now be using the original version Supreme Greens (SGRN)."

Conclusions of Law

25. As described in detail in the June 23, 2004 Preliminary Injunction, the Commission has demonstrated a likelihood of success on the merits in this litigation as against DMC, ITV and Barrett.